

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

1997 Annual Access Tariff Filings

)
)
) **CC Docket No. 97-149**
)

MCI OPPOSITION TO APPLICATION FOR REVIEW

MCI Telecommunications Corporation (MCI) hereby submits its opposition to the Application for Review filed by the Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (SBC) on July 28, 1997, in the above-captioned docket. SBC seeks Commission review of the Common Carrier Bureau's Memorandum Opinion and Order (Order) and requests that the Commission immediately vacate the Order as to SBC and allow the SBC companies' annual access tariffs to take effect as originally filed with a "deemed lawful" status.¹ However, SBC has failed to demonstrate any basis for overturning the Bureau's decision to suspend, for one day, and investigate SBC's annual access filing. Accordingly, the Commission should deny the application for review.

¹AFR at 1.

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In claiming that agency action should be set aside for procedural irregularity, the complaining party bears the burden of showing that prejudice has resulted.² SBC is unable to make this showing. SBC's main complaint is that the Bureau's Order Modifying Deadline decreased by one day the time for SBC to reply to petitions to suspend and investigate and deprived its annual access filing of "deemed lawful" status. SBC contends that this action disregarded SBC's due process rights under the Constitution. However, SBC cites no authority in support of this proposition. In order for a due process claim to be valid, the complainant must show two things: First, there must be a significant property right which is deprived by state action. Second, the revocation of the right must cause some irreparable injury.³ SBC has no valid argument in either case.

First, a Bureau decision to suspend a tariff for one day and institute an investigation is nonfinal and "decides nothing concerning the merits of the case; it merely reserves the issues pending a hearing."⁴ That SBC's tariff is not "deemed lawful" at the outset thus deprives it of no rights, since the lawfulness of the tariff is yet to be determined. Moreover, a decision to suspend and investigate a tariff is "committed by law to the agency's discretion."⁵ Section 204(a)(1) provides that "the Commission,

²See, e.g., American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538 (1970).

³Korematsu v. U.S., 324 U.S. 885 (1944).

⁴Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 240 (D.C. Cir. 1980)

⁵Municipal Light Boards v. FPC, 450 F.2d 1341, 1351-52 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972); See also, Papago, 628 F.2d at 243.

upon delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may suspend operation of such charge, classification, regulation, or practice, in whole or in part. . . .” 47 U.S.C. §204(a)(1). This language commits such decisions “to the exclusive discretion of the agency.”⁶ The procedural rules governing tariff proceedings are primarily for the benefit of the Commission and “do not confer important procedural benefits upon” parties.⁷

Where an agency makes a preliminary decision in the exercise of its discretion to institute an administrative proceeding no hearing at the preliminary stage is required by due process as long as the requisite hearing is held before the final administrative order becomes effective.”⁸ Thus, where the Bureau exercises its exclusive discretion to suspend a tariff and initiate an investigation, no due process rights are implicated. SBC’s due process rights are fully protected by the investigation procedures established in Section 204 of the Act. Since no final decision as to the lawfulness of the tariff or determination of any property rights has been made, SBC has suffered no injury and thus

⁶Maine Public Advocate v. FCC, 828 F.2d 68,69 (1st Cir. 1987).

⁷See, e.g., Aeronautical Radio v. F.C.C., 642 F.2d 1221, 1235 (“Although another purpose of the tariff filing rules is to provide customers, competitors, and the public with information that will serve as a basis for comment, the rules are not ‘intended primarily to confer important procedural benefits upon individuals.’”)

⁸Ewing v. Mytinger & Casselberry, 339 U.S. 594, 598-99 (1950).

has no due process claim.⁹ As long as a party “does have the opportunity to contest [the agency’s] action before the same becomes final . . . this satisfies due process.”¹⁰

Moreover, it is clear that SBC received a full opportunity to be heard. SBC had three business days¹¹ to draft and file its reply comments, and was able to address all of the issues raised by petitioners. SBC’s reply comments include, for example, a detailed analysis of petitioners’ criticism of the SBC companies’ Base Factor Portion (BFP) estimates, the only issue of any complexity raised in the petitions.¹² It is highly unlikely that further comment would have affected materially the Bureau’s ability to determine whether to suspend and investigate SBC’s annual access filing.

SBC’s complaint that three days is insufficient to compose a reply is without foundation. In fact, in its comments in the tariff streamlining proceeding, SWBT contended that two days would be sufficient for LECs to draft replies to petitions to suspend and investigate.¹³ In its application for review, SBC argues that “efforts to develop additional arguments and to further research points in the reply comments were curtailed to meet the objective of filing the reply comments a day earlier than planned.”¹⁴

⁹Clarkson Construction Co.v. OSHRC, 531 F.2d 451, 456 (10th Cir. 1976).

¹⁰See Korematsu.

¹¹Even allowing for the late facsimile transmission of petitions, SBC had three business days to draft and file its reply comments.

¹²SBC Reply Comments, June 26, 1997, at 4-7.

¹³Comments of the Southwestern Bell Telephone Company, CC Docket No. 96-187, October 9, 1996, at 18.

¹⁴AFR at 3-4.

However, SBC had the opportunity to state these additional arguments in its application for review and has failed to do so. It is thus clear that SBC received adequate opportunity to be heard.

Furthermore, the Order Modifying Deadline represented a reasonable exercise of the Bureau's authority. Under the normal comment and reply schedule for tariff filings made on 15 days' notice, reply comments would have been filed on June 27th, a Friday. Because of the intervening weekend, the Bureau would not have been able to issue a suspension order until the following Monday, the 30th of June. Under these circumstances, if the Bureau had decided to suspend the annual access tariffs for one day, the new rates could not have gone into effect on July 1. The Order Modifying Deadline provided the opportunity to, if necessary, issue a suspension order on June 27th and still allow the tariff revisions to go into effect on July 1, as scheduled.

Respectfully submitted,
MCI TELECOMMUNICATIONS
CORPORATION

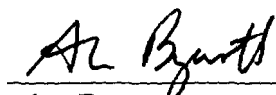


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August 12, 1997

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on August 12, 1997.

A handwritten signature in black ink, appearing to read "Alan Buzacott", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Meslababa Essayas, do hereby certify that copies of the foregoing Opposition were sent via first class mail, postage paid, to the following on this 12th day of August, 1997.

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